IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10119 of 1999

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI Sd/-
and
Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

HAREKRISHNA WADHWANI

Versus

AHMEDABAD URBAN DEVELOPMENT AUTHORITY

Appearance:

MR MIHIR JOSHI WITH MR MITUL K SHELAT
for Petitioner No. 1
MR HS MUNSHAW for Respondent No. 1
MR HL JANI, AGP. for Respondent No. 2
RULE SERVED for Respondents No. 3,6
RULE UNSERVED for Respondent No. 4
MR TUSHAR MEHTA for Respondent No. 5
MR AJ PATEL WITH MR KETAN D SHAH for
Respondent No. 7
MR MK VAKHARIA for Respondent No. 8

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI
and
MR.JUSTICE D.A.MEHTA

Date of decision: 22/02/2002

CAV.JUDGEMENT

(Per : MR.JUSTICE D.A.MEHTA)

1 The petitioner, an individual, has preferred this Special Civil Application under Article 226 of the Constitution of India, interalia praying for following reliefs :

"(A) The Special Civil Application be admitted;

(B) Be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, direction or order quashing and setting aside the order dated 8/8/96 vide No.PRN/96/1/96/6879 at Annexure-G and the approval of plan and directing the respondents not to proceed with any construction on the basis of the same;

(C) Be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, direction or order directing the respondents to produce on record the order whereby the Final Plot No.195/1 and Final Plot No.195/2 are sought to be reconstituted and further this Honourable Court be pleased to quash and set aside the same;

(D) Be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, direction or order, directing the AUDA - Respondent No.1 herein to stop any construction activities on Final Plot No.195/1 by further directing the respondent No.1 to remove construction upon Final Plot No.195/1 which is illegal and contrary to the sanctioned plan;"

2 It appears that one 'Vasupujya Smruti Co.operative Housing Society Ltd.`,(for short 'VPSCHS') was the owner of land consisting of final plot Nos. 195/1 & 195/2 and the total area of such land was 20,840 sq.mtrs., originally falling within the survey nos. 1093/1 to 3, 1094, 1096/2, 1997/2, 10114, 10115 and 1185 of Vejalpur T.P.Scheme No.6. Respondent No.4, acting as an Organiser cum Builder constructed Vasupujya Bungalows and Row Houses as well as Vasupujya Towers ('A' & 'B') on part of the aforesaid land. The petitioner is a member of the said society and owns and occupies a flat in one

of the towers. At the outset, we may make it clear that during the course of the proceedings and even during course of final hearing, though some contentions were raised in relation to so called illegal/excessive construction in relation to Vasupujya Tower'A' and Vasupujya Tower-'B', as the said aspect does not form part of the subject matter of this petition, we have not taken the said aspect into consideration.

3. VPSCHS was thereafter divided into three parts, viz. Vasupujya Smruti Co.operative Housing Society Ltd.Part-I, Part-II & Part-III. This division of the society was approved and/or permitted by the Assistant District Registrar, Co.operative Societies, Ahmedabad by his order dated 3/12/1996. As per the said division the following parcles of land has been allotted to each part of the society as under :

VPSCHS Part-I 16786 sq.mtrs.
VPSCHS Part-II 2090 sq.mtrs.
VPSCHS Part-III 1964 sq.mtrs.

The independent Bungalows, Row Houses fell in VPSCHS part-I, while the High Rise Towers "A" & "B" fell within the VPSCHS part-II. There is no dispute that both the towers comprised of High Rise Residential Flats only. The dispute centers round the proposed construction on land belonging to VPSCHS part-III which was in progress and has been held up due to pendency of the litigation.

4 Some members of VPSCHS part-II challenged the aforesaid order passed by the Assistant District Registrar, Co.operative Societies, Ahmedabad, by preferring an appeal before the Addl. Registrar (Appeals) Co.operative Societies, Gujarat State, Gandhinagar. The Appellate Authority allowed the said appeal on 30/10/1998 and set aside the order dated 3/12/1996. VPSCHS Part-III, therefore, preferred Revision Application Nos. 160 & 161 of 1998 before the State Government. The said Revision Application was granted by the Deputy Secretary, Government of Gujarat, Agriculture and Co.operation Department, Gandhinagar by his order dated 13/5/1999. The order of the Appellate Authority was set aside and that of Assistant District Registrar was restored. The aforesaid order of the State Government was challenged by way of SCA No.7159/97 before this Hon'ble Court and ultimately the said petition came to be disposed of in light of the consent terms arrived at between the parties which have been recorded by the Court in its order dated 28/12/1999. Clause (e) of Paragraph 3 as reproduced in the said order dated

28/12/1999 reads as under :

> "(e) Vasupujya Smruti Co-operative Housing Society Ltd. Vibhag-II agrees and undertakes that after this settlement, there will be no dispute regarding bifurcation of the original society, the said society also agrees that after this settlement, there shall be no dispute with respect to the lands and properties of the Vasupujya Co-operative Housing Society Ltd. Vibhag - III. The respondents undertake the liability that the total area of land of Vasupujya Smruti Co-op. Housing Society Vibhag-II will not reduce from 2090 sq.Mtrs. which is originally allotted to the said society".

5 Incidentally, it may be observed that a Review Petition filed by the present petitioner against the aforesaid order is pending as contended by Mr.Joshi on behalf of the petitioners. However, the said aspect does not have any material bearing in relation to the present petition.

6 Mr.Joshi contended on behalf of the petitioners that the development permission granted by respondent No.1 is illegal and the Court must intervene to hold accordingly, and further direct that any construction put-up in context of the said permission should be demolished. According to the petitioner, originally respondent No.1 had granted development permission on 8/8/1996 as per the plans presented and admittedly the same pertained to Commercial Complex, and hence, as the land fell within the residential zone, respondent No.1 could not have granted permission to construct commercial building in the neighbourhood of Towers "A" & "B" which were undisputedly residential premises. It was further contended that the stand on behalf of the respondents especially, respondent No.1 and respondent No.7 to the effect that the construction was to be carried out in context of the permission granted on 8/1/2001 by respondent No.1 had to be examined whether such a course was permissible in law by merely submitting revised plans. Elaborating on the said aspect Mr.Joshi contended that the legality or otherwise of the permission granted by respondent No.1 should be examined only in light of the original plans passed by way of permission dated

8/8/1996 and the subsequent revised plans and the final permission ultimately granted on 8/1/2001 should be tested with reference to the same viz. original permission. It was submitted that the construction put-up or to be put-up by respondent No.7, has also to be examined whether the same is in consonance with the sanctioned plan as on 8/8/1996. Mr.Joshi further contended that in this context it will be necessary to examine whether any extra Floors Space Index (FSI) had been utilised for construction of the residential towers resulting in reduction of land available for common plot facilities etc. and whether such land which was required to be kept open for the residents of the two towers was not handed over to VPSCHS Part-III. He further submitted that in light of this situation whether any construction was permissible on such sub-divided plot, and if it was so permissible, it was necessary to first deduct the area from the said sub-divided plot as relatable to, and to which Vibhag-II was entitled before giving said sub-divided plot of land to Vibhag No.III. In this context attention of the Court was invited to various documents including the original plan, first permission dated 8/8/1996 as well as various affidavits filed by respondent No.1, in reply to the petition.

7 Mr.Joshi also addressed the Court as regards the ownership of the land in question by referring to the permission granted by the State Government under Section 20(1) of the Urban Land (Ceiling and Regulations) Act,1976 (for short 'ULC Act'). The submission was to the effect that the land in question belonged to New Gayatrinagar Co-operative Housing Society Ltd., and Vasupujya Smruti Co-operative Housing Society Ltd. as well as Green Wood Co-operative Housing Society could never have become the owner of the land in light of the aforesaid order of the State Government passed under Section 20(1) of the ULC Act, especially, in terms of the provisions of the Act and the conditions imposed when the aforesaid order was passed by the State Government. In this context, it was also submitted that the petitioner may be permitted to amend the petition as prayed in Civil Application No.267/02. It was further submtited that as per the affidavit filed on behalf of respondent No.1, the respondent No.1 authority had issued various notices for removing illegal constructions and ultimately on 8/9/2000 even revised plan has been rejected. That it was not thereafter permissible to respondent No.1 to entertain any revised plan and grant permission on such a revised plan having rejected a revised plan once.

8 Mr.H.S.Munshaw, learned Advocate appearing on

behalf of respondent No.1 referred to the three affidavits-in-reply filed by the said authority to emphasise the fact that respondent No.1 had not been negligent at any stage, as averred by the petitioner, but had acted all throughout in accordance with law. In this context our attention was invited to the fact that the officers of respondent No.1-authority carried out the site inspections from time to time and on finding that illegal construction had been carried out issued various notices commencing from 1/12/1997 upto 8/9/2000. That in all five notices have been issued and as could be seen from the affidavits in reply respondent No.7 had been carrying out necessary modifications or removing part of construction which was not in accordance with the permission granted. That ultimately on 8/9/2000 the revised plan had been rejected. He further contended that there was no prohibition in law restraining a party desiring to put-up construction from submitting revised plans one after another. The only requirement in law according to Mr.Munshaw, was to the effect that the ultimate construction had to be in accordance with law and as per permission granted by the appropriate authority.

9. Mr.A.J.Patel, learned Advocate appearing on behalf of respondent No.7 i.e. VPSCHS Part-III, at the outset raised preliminary objection to the petition being entertained. According to him, the case of the petitioner was that AUDA i.e. respondent No.1 had not done its duty, that permission granted under Section 20(1) of the ULC Act had been violated and that respondent No.1 - AUDA had flouted the orders of the Court. He submitted that it was not open to the petitioner to raise the aforesaid issues in as much as there was no violation of any law nor was there any lapse in carrying out duty cast upon the authority under the provisions of the law. Our attention was invited to various provisions of Gujarat Co-operative Societies Act as well as Gujarat Town Planning & Urban Development Act,1979 and the provisions of ULC Act. He pointed out that the petitioner was a member of Vibhag II since 1991 and the two residential towers were constructed on final plot No.195/1 and such construction was completed in 1992. Accordingly, the petitioner and other members had occupied the two towers for the purpose of residence in 1992-93. Mr.Patel further contended that the Court should not permit the petitioner to raise issues which had been settled and which did not form part of the petition originally. This submission was made in the context of the prayer made by the petitioner to grant Civil Application for amendment and permit the petitioner

to challenge the action of the respondents on the basis that there had been violation of provisions of the ULC Act. Mr.Patel also pointed out that the petitioner became member in 1991 and the division of New Gayatrinagar Co.operative Housing Society had taken place on 3/5/1990 i.e. before the petitioner acquired membership and hence also it was not open to the petitioner to take up the contention challenging such division. In so far as the sub-division was concerned which took place on 3/12/1996 it was submitted that the said aspect had become final and in this context our attention was invited to the chronology of events commencing from the order of Assistant District Registrar and culminating in the order of this Court dated 28/12/1999 passed in SCA No.7159/97.

10. Mr.Tushar Mehta, learned Advocate appearing on behalf of respondent No.6 i.e. VPSCHS Vibhag II Society wherein the petitioner resides as a member questioned the locus of the petitioner to raise the challenge by way of this petition. According to Mr.Mehta, once the petitioner was a member of the society it was incumbent upon him to abide by the decision of the majority members of the society and it was not possible for a single member to rake up issues which had already been settled by the society acting as a body. According to him by virtue of resolutions passed at the Annual General Meeting on 26/9/1999 the dispute had been resolved between the society and respondent No.7 and as such the petitioner should not be heard in relation to the same subject matter which had already come to an end. He further submitted that the dispute raised by the petitioner was not a public interest litigation, as was sought to be made out because the petitioner was merely trying to create a situation whereby the society would wipe off the debt of Rs.1,00,000/- for which the petitioner was indebted to the society.

11. Having considered the various submissions made on behalf of the parties we feel that this petition requires to be rejected for the reasons which follow :

12. As can be seen from the various prayers extracted hereinbefore the basic thrust of the petition is that respondent No.1, viz. AUDA has failed in its duty. In so far as the first prayer is concerned seeking to quash and set aside the order dated 8/8/1996 passed by AUDA approving the plan, the said prayer cannot be granted in view of the fact that respondent No.1 - Authority has itself directed respondent No.7 to remove illegal construction and furthermore, more importantly, the said

order and approved plan did not remain in force in light of the subsequent permission granted on 8/1/2001 on the presentation of revised plan. As regards the contention on behalf of the petitioner that the Court must first of all direct the respondents to remove the entire construction which was put-up in accordance with original plan before a revised plan can be presented for approval, it is not possible to accept the said contention. In case of a revised plan if it is possible to utilize the partially constructed structure so as to fall within the prescribed parameters and obtain sanction of the appropriate authority in accordance with law, we do not find any valid reason to hold that a structure which was put-up, may be in violation of the original sanctioned plan (and now given up), cannot be utilized as a base for the purpose of putting up further construction in light of a revised plan. This is ofcourse subject to Caveat : such revised plan and sanction thereof have to be structurally feasible/permissible in light of relevant provisions of laws as may be applicable. In case the contention on behalf of the petitioner is accepted, it would lead to avoidable wastage of money, materials, labour as well as time.

13. In relation to the prayer seeking direction to the respondents to produce order seeking reconstitution of final plot nos. 195/1 and 195/2 are concerned, it may be noted that the said aspect is dealt with in the affidavit dated 30/8/2000 filed by one Mr.R.S.Gandhi, Senior Town Planner, Gandhinagar. In the said affidavit reference has been made to various provisions of the Town Planning Act and the duties of the Town Planning Officer and it has been submitted that no objections have been received till date from the owners, interested parties and AUDA with reference to the allotment in respect of the final plot No.195/1 and in so far as other portion is concerned the plots have been allotted as per the understanding before the High Court mutually by the owners and AUDA while finalizing Town Planning Scheme by the Town Planning Officer. In light of this situation and the explanation tendered by way of affidavit, it is not possible to grant prayer at clause (c). What is more important and pertinent to note is that the plots have been reconstituted by the Town Planning Officer having jurisdiction under the provisions of the Gujarat Town Planning and Urban Development Act,1976 by issuance of an order in form No.'J' on 6/1/2001. On going through the said order it is apparent that it contains the details as to area of the original plot, area of the reconstituted plot as well as it also refers to the ownership of different vibhags in relation to various reconstituted

plots. The provisions of the Town Planning Act, with special reference to Section 47 of the Act provide for raising of objections to the Draft Scheme within one month from the date of publication of the Draft Scheme. Thereafter, under Section 48(1) of the said Act, the Appropriate Authority is required to submit Draft Scheme with modifications that may have been made on consideration of objections made under Section 47 of the said Act for the sanction of the State Government. In the present case, nothing has been pointed out to show that the petitioner had availed of such an opportunity under the provisions of the said Act.

14. On going through permission dated 8/1/2001 granted by respondent No.1 we find that except for six shops on ground floor the entire complex is for residential purpose and in column No.1 same has been distinctly stated. Permission is granted totally for 79 flats, 6 shops and one Nursing Home, while basement hollowplinth have been delineated for the purpose of parking. The said permission carries with it various conditions and the sanctioned plan which is attached to the said permission also carries with it various conditions.

15. In so far as the prayer in clause "D" is concerned, as already set out hereinbefore, respondent No.1 has categorically stated in its reply affidavits that construction upon final plot No.195/1 which is illegal and contrary to sanctioned plan has already been demolished and nothing further is required to be done. Furthermore, as can be seen there is no further construction which is undertaken on final plot No.195/1/1 in light of the fact that the said plot of land already has construction of Vibhag No.II and no further land is available for any further construction on the said plot. However, in so far as plot No.195/1/2 is concerned the construction is in relation to Vibhag No.III and the said sub-division or reconstitution of the plot has become final as already stated.

16. During the course of hearing it was vehemently contended on behalf of the petitioner that as there was violation of the order under Section 20(1) of the ULC Act,1976 it was open to the State Government to withdraw the exemption under Section 20(2) of the ULC Act. Mr.Joshi contended that though the Act was repealed by the Repeal Act of 1999 with effect from 30/3/1999 yet by virtue of Section 3(1)(b) which deals with savings under the Repeal Act,1999, it was always permissible to the State Government to exercise its powers under Section

20(2) of the Act. Alternatively, it was submitted that once it was shown that the exemption granted under Section 20(1) of the ULC Act was violated by not fulfilling the condition attached to such exemption order it was always open to the Court in its jurisdiction under Article 226 of the Constitution of India to mould the relief to ensure that the parties acted in consonance with law and not in derogation thereof. This submission was resisted on behalf of the respondents by referring to the Government Resolution No.ULC-2000-GOI-793-V.1 dated 30/11/2000 whereunder it is specifically stated that the provisions of the Repeal Act have not provided for saving the provisions of Section 20(2) of the ULC Act and hence, it is not possible to take any action in cases of breach of conditions of order under Section 20(1)of the ULC Act, and even in cases where such disputes are pending before any Court, Tribunal or Authority such pending matters or proceedings will come to an end and the Repeal Act would operate accordingly.

17. We may usefully reproduce the relevant extract of the observations made by Division Bench (Coram :B.C.Patel and Ravi R.Tripathi,JJ) in one of the interim orders dated 11/01/2001 wherein it is stated -

" xxx xxx xxx So far as the dispute is concerned, it appears that the society divided the plots and therefore, the societies came into existence. If on the individual plots construction which is already carried out as per the size of the plot and in a plot where construction is to be carried out, if it is as per the rules and regulations, possibly, there should be no difficulty".

18. After having heard all the parties we have come to the conclusion that this is a dispute primarily inter se between the petitioner on the one hand and the members of Vibhag No.II on the other hand which has spilled over in relation to Vibhag No.III and it has been brought before the Court as if it's in the nature of a common problem, if not public interest litigation. Though the petitioner has tried to present the matter in the form of showing concern for well being of the members of Vibhag No.II, we do not find that any such case is made out. The petitioner being member of the Co.operative Society viz. Vibhag No.II, it is necessary for the well-being and smooth functioning of the society that the opinion arrived at by the majority of members comprising the society is accepted by those who are in minority. This

is the essential characteristic and basic feature of any Co-operative Society and the law of Co-operatives is also based on principles of democracy whereunder the opinion of the majority comprising particular Co-operative shall prevail.

19. In the result, the petition fails. Rule is discharged. Interim relief stands vacated. Parties to bear costs respectively.

CIVIL APPLICATION NOS. 3389/2000, 6255/2001, 267/2002 AND 350/2002.

20. In light of our order in main petition all these Civil Applications are disposed of as infructuous.

Sd/-
(D.M.Dharmadhikari, C.J)
Sd/-
(D.A.Mehta, J)

m.m.bhatt